

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

NICHOLAS ZIMMERMAN,

Plaintiff,

v.

SOCIAL WORKER RICHARD PAUTZ, *et al.*,

Defendants.

**DECISION
and
ORDER**

12-CV-763A(F)

APPEARANCES:

NICHOLAS ZIMMERMAN, *Pro Se*
02-A-1663
Wende Correctional Facility
P.O. Box 1187
Alden, New York 14004

ERIC T. SCHNEIDERMAN
NEW YORK STATE ATTORNEY GENERAL
Attorney for Defendants
RYAN L. BELKA,
Assistant Attorney General, of Counsel
Main Place Tower, Suite 300A
350 Main Street
Buffalo, New York 14202

In this prisoner civil rights action, Plaintiff alleges violations of Plaintiff's First Amendment rights in connection with interference with Plaintiff's mail and an unlawful mail watch, Eighth Amendment violations based on alleged excessive force and failure to protect, and federal Due Process violations arising from disciplinary hearings and a conspiracy. By papers filed June 21, 2017, Plaintiff moves to compel document production and for permission to depose Defendants ("Plaintiff's discovery demands") (Dkt. 48 at 2) ("Plaintiff's motion"). In opposition, Defendants contend Plaintiff has failed to serve any of Plaintiff's discovery demands in accordance with Fed.R.Civ.P. 30(a) and Fed.R.Civ.P 34(a). Dkt. 55 at 2. Defendants further contend Plaintiff has failed to file

Plaintiff's discovery demands as required by Local R.Civ.P. 5.2(f)(1)(E) ("Rule 5.2(f)(1)(E)") (requiring all papers including discovery requests in *pro se* cases be filed). Defendants also contend Plaintiff's motion fails to comply with Fed.R.Civ.P. 37(a) ("Rule 37(a)") (requiring parties engage in good faith effort to resolve discovery disputes as a precondition to filing motions to compel). Nevertheless, Defendants state Defendants have recently served responses to Plaintiff's discovery demands as stated in Plaintiff's motion. Dkt. 55 n. 4. Plaintiff has not responded to Defendants' opposition.

It is well-settled that a *pro se* party is required to comply with Rule 5.2(f)(1)(E). See *Hill v. Stewart*, 2012 WL 1232091, at *4 (W.D.N.Y. Apr. 12, 2012); *Brown v. Lian*, 2012 WL 4551474, at *3 (W.D.N.Y. Sept. 29, 2011). The court's inspection of the docket establishes Plaintiff has failed to comply with Rule 5.2(f)(1)(E) with respect to Plaintiff's discovery demands. *Pro se* litigants are also required to comply with the good faith meet and confer requirement of Rule 37(a). See *Nowlin v. Lusk*, 2014 WL 298155, at *6 (W.D.N.Y. Jan. 28, 2014) (citing *Fox v. Poole*, 2007 WL 837117, at *3 (W.D.N.Y. Mar. 15, 2007)). Additionally, as Plaintiff failed to serve Plaintiff's discovery demands, there is no basis upon which to consider a motion to compel pursuant to Rule 37(a).

Under Fed.R.Civ.P. 30(b)(4) ("Rule 30___"), a *pro se* litigant may designate an oral deposition be taken by telephonic means provided the requirements of Rule 30(b)(5)(A)-(C) (relating to appointment of officer designated pursuant to Fed.R.Civ.P. 28, conduct of the deposition, and arrangement to secure the recording or transcript) are satisfied.¹ See *Gordon v. Parole Officer Semrug*, 2016 WL 259579, at *1 (W.D.N.Y.

¹ Although Plaintiff does not specify the means for the requested depositions given that Plaintiff is housed at a prison facility other than a facility where Defendants are employed, the court presumes Plaintiff's request is for telephonic depositions.

Jan. 21, 2016). In the case of an incarcerated plaintiff, like Plaintiff, the requirements are similar, see *Nowlin*, 2014 WL 298155, at *9, but as a practical matter more difficult because of the obvious issues of prisoner security and logistical requirements imposed by the prison. *Id.* (citing *Beckles v. Artuz*, 2005 WL 702728, at *2 (S.D.N.Y. Mar. 25, 2005) (noting that *pro se* prisoner is required to pay all costs associated with telephonic oral depositions and the court unable to subsidize such costs even if plaintiff is proceeding *in forma pauperis*)). Before authorizing oral depositions in a prisoner civil rights case courts requires that a prisoner is also required to submit a plan to the court explaining how plaintiff intends to comply with the requirements of Rule 30 and in view of the practical difficulty in obtaining prison officials' cooperation, consider proceeding by deposition upon written questions pursuant to Fed.R.Civ.P. 31 or interrogatories pursuant to Fed.R.Civ.P. 33 as an alternative. See *Nowlin*, 2014 WL 298155, at *10 (citing *Beckles*, 2005 WL 702728, at *1). Plaintiff has demonstrated no effort to comply with Rule 30(b)(5)(A)-(C) nor explained how Plaintiff expects to meet these prerequisites for Defendants' telephonic oral depositions as sought by Plaintiff.

CONCLUSION

Based on the foregoing, Plaintiff's motion (Dkt.48) is DENIED without prejudice.

SO ORDERED.

/s/ Leslie G. Foschio

LESLIE G. FOSCHIO
UNITED STATES MAGISTRATE JUDGE

Dated: August 9, 2017
Buffalo, New York

Any appeal of this Decision and Order must be taken by filing written objection with the Clerk of Court not later than 14 days after service of this Decision and Order in accordance with Fed.R.Civ.P. 72(a).